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IN THE

Supreme Court of the United States

Term, 196

~~Miscellaneous~~ No. 629

JOHN E. FRANCIS,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

DOMENICK VITULLO
A. CHARLES PERUTO
Counsel for Petitioner

202 North Broad Street
Philadelphia, Penna. 19102

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4

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Petitioner, JOHN E. FRANCIS, prays that a writ of certiorari issue to review the judgment of the Superior Court of Pennsylvania entered in the above entitled case on June 12, 1963.

OPINIONS BELOW

The memorandum opinion of the trial judge of the Court of Quarter Sessions of Philadelphia County, Pennsylvania, is unreported and is printed in Appendix A hereto, infra, p. 29. The opinion of the Superior Court of Pennsylvania, printed in Appendix B hereto, infra, p. 16, is reported in 201 Pa. Super. 313, 191 A. 2d 884.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on June 12, 1963. A petition for allowance of appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania was filed and the petition for allowance of appeal was denied per curiam by the Supreme Court of Pennsylvania on August 19, 1963. (Commonwealth of Pennsylvania v. John E. Francis, Petitioner, No. 198 Allocator Docket No. 4). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED

1. In the trial of a defendant in a state court on felony charges, is it in violation of due process to disclose to the jury the contents of a statement which was illegally obtained from the defendant?

2. In the trial of a defendant in a state court on felony charges, is it in violation of due process to admit evidence of an alleged unrelated offense for which the defendant was never convicted?

3. In the trial of a defendant in a state court on felony charges, is it in violation of due process to admit records and letters without any evidence as to the authenticity or genuineness of the records and letters?

4. In the trial of a defendant in a state court on a series of felony charges, is it in violation of equal protection of the laws to reverse the convictions on charges on which evidence was improperly admitted but to permit the convictions on the remaining charges to stand?

5. In the trial of a defendant in a state court on felony charges, is it in violation of due process when extensive adverse publicity by news media prevents a fair and impartial trial?

6. In the trial of a defendant in a state court on felony charges, is it in violation of due process for the prosecution to suppress evidence which may be beneficial to the defendant?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the 14th Amendment to the Constitution of the United States which provides:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Grand Jury of Philadelphia, Pennsylvania, returned true bills of indictment against the petitioner as of July Session, 1961; Nos. 1474 to 1482, inclusive, charging bribery by a servant and employee; Nos. 1483 to 1485, inclusive, charging cheating by false pretenses, a felony under Section 836 of the Penal Code of Pennsylvania, Act of June 24, 1939, PL 872, Section 836, 18 PS Section 4836; Nos. 1486 to 1494, charging extortion; No. 1572 charging false documents; and Nos. 1573 to 1576 inclusive, charging conspiracy.

The petitioner went on trial before a jury on May 7, 1962, and after six trial days on May 14, 1962, the jury returned verdicts of guilty on indictments 1474 to 1480, inclusive; on indictments 1486 to 1490, inclusive; on indictments 1493 and 1494; on indictments, 1483, 1484 and 1485; and indictments 1573 to 1576, inclusive. The jury returned verdicts of not guilty on indictments 1481, 1482, 1491 and 1492. A demurrer was sustained to indictment 1572.

The petitioner filed motions in arrest of judgment and for new trial. After the filing of briefs and arguments, the trial judge granted the motion in arrest of judgment on indictments 1474, 1475, 1476, 1480, 1486, 1490, 1493, 1494 and 1576 and the petitioner was discharged on these indictments. The motion in arrest of judgment was dismissed as to the remaining indictments and the motion for a new trial was also dismissed. The petitioner was sentenced to a term of 11½ to 23 months in the Philadelphia County Prison on indictment 1483, charging cheating by false pretenses, a felony, and sentence was suspended on the remaining indictments on which he stood convicted. An appeal was taken on behalf of the petitioner to the Superior Court of Pennsylvania. That court sustained the appeal and discharged the petitioner on indictments 1487, 1488, 1489, 1573 and 1574. However, the appeal was dismissed as to indictments 1477, 1478, 1479, 1483, 1484, 1485 and 1575. A petition for the allowance of an appeal from the Superior Court of Pennsylvania was filed with the Supreme Court of Pennsylvania and without argument or an opinion, this petition was denied per curiam by the Supreme Court of Pennsylvania.

The petitioner, from December 27, 1954, to May 5, 1961, held the position of Deputy Commissioner in the Department of Public Property of the City of Philadelphia. It was the theory of the Commonwealth of Pennsylvania, that the petitioner, together with Harold V. Varani, who held the position of Chief of Architecture and Engineering in the Department of Public Property, Benjamin D. Barone, Secretary to the Commissioner of Public Property, and Eli G. Travis, a contractor, committed unlawful acts in connection with a contract awarded to one of Travis's companies by the City of Philadelphia. According to the Commonwealth of Pennsylvania, Travis gave to the petitioner, Varani and Barone, money and other gifts and they in turn assisted Travis in obtaining the contract and also conspired with Travis in connection with alleged work short-cuts on the contract. Travis pleaded guilty and was placed on pro-

bation for a period of two years. Varani and Barone were both acquitted.

1. On April 15, 1961, which was weeks prior to the arrest of the petitioner, the petitioner was summoned to the office of the Controller of the City of Philadelphia. Without being given any reason for this summons, he was sworn and subjected to an intensive interrogation by the Controller and the members of his staff. These questions and answers were taken stenographically at that session and subsequently transcribed. At the petitioner's trial, the Assistant District Attorney, asked that this transcription be marked for identification as Commonwealth's Exhibit C-11g and it was identified by a Commonwealth witness, William T. Gennetti, who was present at the time of the interrogation and who was at that time Commissioner of Public Property of the City of Philadelphia, as the sworn statement of the petitioner. Objections were interposed by defense counsel to the marking of the statement as an exhibit and to its identification by the witness. These objections were overruled by the trial judge. Mr. Gennetti was then asked by the Assistant District Attorney whether there was any duress connected with the taking of the statement from the petitioner and the witness answered that there was not. (N. T. 142-145). However, during his cross-examination, Mr. Gennetti, who is also a lawyer and a member of the Bar of the City of Philadelphia, testified that there was duress connected with the taking of the statement from the petitioner. (N. T. 253-254). Nevertheless, on re-direct examination, the Assistant District Attorney asked Mr. Gennetti a series of leading questions which the witness was permitted to answer by the trial judge over objection by defense counsel. These leading questions and the answers to these questions disclosed to the jury the contents of the statement which Mr. Gennetti had previously testified was taken from the petitioner under duress. (N. T. 256-262).

2. There was admitted into evidence against the petitioner at his trial, testimony concerning the petitioner's

alleged involvement in a totally unrelated offense for which he was never convicted or even arrested. This testimony was admitted over objections interposed on behalf of petitioner, which objections were overruled. (N.T. 55-57, 145-149).

3. At the petitioner's trial there were read to the jury and admitted into evidence, over objections by defense counsel which were overruled, a series of Commonwealth exhibits consisting of that which purported to be business records of the Diner's Club Inc.; Astor Hotel, New York City; and other memoranda and letters with absolutely no testimony introduced as to the genuineness or authenticity of these records, memoranda, and letters. Commonwealth Exhibits C-17 and C-18 included bills of Diner's Club Inc. made out to the petitioner which were read to the jury and admitted into evidence over objections by defense counsel. (N.T. 290-291, 591). Commonwealth Exhibit C-12 included that which purported to be a letter and bill from the Hotel Astor, New York City. This was read to the jury and admitted into evidence over objections by defense counsel. (N.T. 283, 286, 590). Commonwealth Exhibits C-11a and C-11d are letters purportedly authored by individuals who were never called as witnesses nor were they ever arrested in connection with this case, nor were any signatures on these letters ever identified as being the signatures of the purported authors. These letters were read to the jury and admitted into evidence over objections by defense counsel. (N.T. 130-133, 590).

4. The petitioner filed a motion in arrest of judgment as to each of the indictments on which he was found guilty by the jury. The trial judge granted the motion and discharged the petitioner on three indictments charging bribery and three indictments charging extortion, all having to do with the alleged payment by Travis for the petitioner of Diner's Club bills and a bill of the Hotel Astor, New York City. The petitioner argued both before the trial judge and the Superior Court of Pennsylvania, that docu-

ments which purported to be business records of the Diner's Club, Inc. and the Hotel Astor were improperly admitted into evidence because no one, from either Diner's Club, Inc. or the Hotel Astor, testified as to the authenticity or genuineness of these documents. The Superior Court of Pennsylvania, in its Opinion, disregarded this contention on the ground that the cases relating to the payment of the Diner's Club bills and the bill of the Hotel Astor were not before it because the trial judge granted motions in arrest of judgment as to the indictment specifically covering these items. The petitioner argued in his petition for the allowance of appeal from the Superior Court of Pennsylvania filed with the Supreme Court of Pennsylvania that: "The Superior Court indicates that the issue of admissability of these records is moot because these records pertain to indictments not presently before the court. However, there is not involved here 26 separate cases covered by 26 separate indictments. This is one case. The theory of the Commonwealth is that the petitioner received certain things of value in exchange for which he did certain things for Travis. The petitioner was found guilty by the jury in the indictments specifically relating to the Astor Hotel and Diner's Club, Inc. The court should not be permitted to eliminate the prejudicial effect of this evidence, improperly admitted, simply by granting a motion in arrest of judgment to the indictments specifically relating to the Astor Hotel and Diner's Club. Moreover, the jury may well have found the petitioner guilty of false pretenses and conspiracy because of this improper evidence. In other words, once cancer has been permitted to spread throughout the entire system, it does the victim no good whatsoever to then cut out the organ which was initially affected." The Supreme Court of Pennsylvania denied per curiam the petition for allowance of appeal from the Superior Court of Pennsylvania.

5. The petitioner and his alleged co-conspirators were arrested in connection with this case in May, 1961. The petitioner went on trial on May 7, 1962. The circumstances

which gave rise to the instant case received extensive newspaper, radio and television coverage preceding the trial. This extensive coverage included not only accounts of alleged facts presented at the trial, but also accounts of alleged facts which were not presented at the trial; facts which could not have been legally presented at the trial. For example, the news accounts included alleged pay-offs and gifts given by Travis to numerous other city employees. Application was made for a Grand Jury investigation and this also received extensive news coverage and some, if not all, of the Philadelphia newspapers openly favored such an investigation. The application was ultimately granted and a Grand Jury is still in session conducting an investigation. Not only was there extensive news coverage preceding the trial, but in addition, there was extensive news coverage of the trial itself. Also, during the petitioner's trial, disclosure was made of an alleged scandal involving other municipal agencies. The petitioner went on trial on Monday, May 7, 1962. The Commonwealth rested its case on Friday, May 11, 1962. The Court recessed for the day at approximately 4 P. M. On that Friday evening, City Controller Alexander Hemphill, decided to make known to the members of the press, radio and television, the results of an investigation, which had been proceeding for some time, concerning another municipal "scandal". The jury separated each day and no warnings were given by the trial judge not to read newspapers or listen to or watch radio and television accounts of the trial until the conclusion of the fourth day of trial. (N.T. 8-9, 86-87, 218, 383, 507) Even the warning at that time only had to do with the reading of news articles. No warning was given concerning radio and television. At the conclusion of Friday's session, shortly before Alexander Hemphill made the disclosure of the alleged new scandal, no warning was given concerning newspapers, radio and television. (N.T. 592) On Monday morning, May 14, 1962, defense counsel moved for the withdrawal of a juror because of the news coverage of the al-

leged new scandal and because of the news coverage of the trial itself. This motion was denied. (N.T. 613-614).

6. Prior to the trial of the petitioner, there was filed on his behalf, a motion for the production of the books and records of Eli G. Travis and his companies, which motion was denied by the Court of Quarter Sessions of Philadelphia. At the petitioner's trial, Travis testified that he made a $5000.00 cash pay-off to the petitioner's alleged co-conspirator, Varani, and a $5000.00 cash pay-off to the petitioner's alleged co-conspirator, Barone, in the month of May, 1959, and that this $10,000.00 came from one of his corporations. (N.T. 297, 324-325). At Varani's trial, to support Travis's testimony that he gave Varani and Barone $10,000.00 in May, 1959, the Commonwealth produced three checks of one of Travis's companies, the Hughes Steel Erection Company, made payable to "Payroll" from which Travis obtained the $10,000.00. The first check, in the amount of $3,333.33, is dated May 11, 1959. The second check, in the same amount, although dated May 20, 1959, cleared the bank on May 18, 1959. The third check, in the amount $3,333.34, is undated but cleared the bank on June 11, 1959. On the other hand, defense counsel produced two checks of the Hughes Steel Co. also made payable to "Payroll". The first check, in the amount of $5,300.00, is dated May 6, 1959, and the second check, in the amount of $4,700.00, is dated May 20, 1959. According to the evidence produced at Varani's trial, the latter two checks constitute the only combination of checks drawn on the account of the Hughes Steel Erection Co. in May, 1959, totalling $10,000.00. Neither of these checks were endorsed and both of them were cashed at the bank on which they were drawn. Significantly, on May 6, 1959, the date of the first check produced by defense counsel, $5,300.00 in cash was deposited by Travis in a new account opened at another bank in the names of Eli G. Travis and Wallace Mathis, as President and Treasurer, respectively, of another of Travis's companies. On May 21, 1959, the day after the date

of the second check, $4,700.00 in cash was deposited in that new account. The obvious conclusion to be drawn from this is that Travis took $10,000.00 from the Hughes Steel Erection Co. in May, 1959, but did not give it to the petitioner's alleged co-conspirators, Varani and Barone, rather, he converted the $10,000.00 to his own use. Unfortunately, defense counsel did not become aware of the existence of these important facts until after the petitioner's trial. The point here made is important especially since after these facts were made known, both Varani and Barone were acquitted. The petitioner did not have the benefit of these facts. This point was argued before the Superior Court of Pennsylvania, but that court simply ignored it and no mention of it is made in its Opinion.

REASONS FOR GRANTING THE WRIT

1. *Petitioner's Sworn Statement*

Through the medium of leading questions, the Assistant District Attorney had the Commonwealth witness, Mr. Gennetti, testify that in the petitioner's statement the petitioner admitted that he was in charge of the work covered by the contract involved in this case and that the petitioner's alleged co-conspirator, Varani, worked under him. He also had the witness testify that the petitioner admitted going to Stone Harbor, which had to do with one of the gifts allegedly given to the petitioner by Travis. (N.T. 256-262) Also, the witness testified that the petitioner was dismissed from his position as Deputy Commissioner of Public Property as a result of the statement. (N.T: 262) Whether the petitioner was in fact in charge of the contract involved in this case and whether the alleged co-conspirator, Varani, did in fact work under him and whether the petitioner did in fact go to Stone Harbor were important issues in this case and they should not have been resolved through the

use of a statement obtained from the petitioner under duress. Under these circumstances, the petitioner's sworn statement can certainly be considered in the nature of a confession.

It is well settled that the Supreme Court of the United States will overturn a felony conviction in a State Court if at the trial an involuntary confession is admitted into evidence because such a trial violates due process. *Lynumn v. Illinois*, 372 U. S. 528, 83 S. Ct. 917; *Haynes v. Washington*, 370 U. S. 902, 83 S. Ct. 1336. In the instant case there can be no doubt that the petitioner's statement or confession was obtained under duress. The Commonwealth's own witness testified that it was obtained under duress and only after the Commonwealth itself opened the door to this line of inquiry. Moreover, the Superior Court of Pennsylvania in its opinion, agrees with the position of the petitioner that his statement was illegally obtained because that opinion states that the trial judge in his charge to the jury ruled out the statement and the Superior Court could not say that the trial judge abused his discretion in acting as he did on such a controversial point of the case. (Infra p. 26)

Although the trial judge ruled out the statement in his charge to the jury, he did not rule out the testimony disclosing the contents of the statement to the jury. As a matter of fact, in his charge the trial judge reviewed the testimony concerning the statement and repeated the testimony that the petitioner was dismissed from his position as a result of this statement. (N.T. 703-704) To be strictly accurate, the trial judge could not rule out the statement because the statement was never offered into evidence. The Assistant District Attorney had accomplished his purpose without offering the statement into evidence by disclosing to the jury, through the medium of leading questions, the contents of the statement. To rule out the statement, which was not offered into evidence, without ruling out the testimony disclosing the contents of the statement to the jury was a vain act. In any event, this prejudicial evidence could not have been erased from the minds of the jurors through

instructions. The statement was obtained under duress and to disclose its contents to the jury violated due process.

2. *Evidence of an Unrelated Offense*

At the petitioner's trial, evidence was admitted against him of a totally unrelated offense for which he was never arrested, tried, or convicted. One of the most fundamental principles in the administration of criminal justice is that a distinct crime cannot be given in evidence against a defendant who is being tried for another crime. *Commonwealth v. Burdell*, 380 Pa. 43, 110 A. 2d 193. The objection to this sort of evidence is that it compels the defendant to meet a charge of which he had no notice. It confuses him in his defense, raises collateral issues, diverts the attention of the jury from the crime immediately being tried, and generally shows that the defendant should be convicted because he is a bad man. *Commonwealth v. Boulden*, 179 Pa. Super. 328, 116 A. 2d 867. It is submitted that to admit such evidence against a defendant on trial in a state court for felony is such basic and fundamental error as to be a violation of due process.

3. *Admission of Unauthenticated Records and Letters*

There is nothing more basic and fundamental in the administration of criminal justice than to afford a defendant on trial on felony charges the opportunity to be confronted by witnesses appearing against him; to have witnesses appearing against him testify only under oath; and, to afford the defendant the opportunity to cross-examine such witnesses. The admission into evidence of records and letters without producing anyone to authenticate the records and without producing the purported authors of the letters, is a flagrant violation of this principle. The admission into evidence against the petitioner of records and letters without confronting the petitioner with the authors of these records and letters and without placing the author under oath and without affording the petitioner the oppor-

tunity to cross-examine them was in violation of the Due Process Clause of the Fourteenth Amendment.

4. *Equal Protection of the Law*

The petitioner was tried at the same time on 26 bills of indictment. However, all of these indictments resulted from the same alleged facts and circumstances or series of alleged facts and circumstances. The petitioner argued before the trial judge that that which purported to be records of the Astor Hotel and the Diner's Club, Inc. was improperly admitted into evidence because no one from the Astor Hotel or Diner's Club Inc. was called to testify concerning the authenticity or genuineness of these records. The trial judge reversed the convictions on the indictments specifically referring to the Astor Hotel and the Diner's Club, Inc. It was argued before the Superior Court of Pennsylvania, that these records were improperly admitted into evidence. The Superior Court disregarded this argument on the ground that the issue of admissability of these records was moot because these records pertained to indictments which were not before that court. However, there is not involved here 26 separate cases covered by 26 separate indictments. This is one case. The theory of the Commonwealth is that the petitioner received certain things of value in exchange for which he did certain things for Travis. The petitioner was found guilty by the jury on the indictments specifically relating to the Astor Hotel and Diner's Club, Inc. The court should not be permitted to eliminate the prejudicial effect of this evidence; improperly admitted, simply by reversing convictions as to the indictments specifically relating to the Astor Hotel and Diner's Club, Inc. Moreover, the jury may well have found the petitioner guilty of cheating by false pretenses, a felony, and conspiracy because of this improper evidence. The petitioner, as every other defendant convicted of a crime in the courts of the Commonwealth of Pennsylvania, had the right of appeal. By reversing the convictions on indictments on

which evidence was improperly admitted and by using this as a basis for refusing to consider the appeals on other indictments to which the improperly admitted evidence also applied, was in effect a denial to the petitioner of his right of appeal and constitutes a violation of his rights under the Equal Protection Clause of the Fourteenth Amendment.

5. *Adverse Publicity*

As hereinbefore pointed out, there was extensive coverage by newspapers, television and radio concerning the alleged facts and circumstances giving rise to this case before and during the trial. The sensational news stories concerned not only the petitioner, but many other city officials and employees and concerned also alleged scandals which had absolutely nothing to do with the petitioner. It is felt that the release of the news story concerning alleged scandals in another city department in the midst of the petitioner's trial, was calucluated to prejudice the petitioner. The extensive and adverse publicity by the news media made a fair trial impossible and resulted in violation of the petitioner's rights under the Due Process Clause of the Fourteenth Amendment.

6. *Suppression of Evidence*

In *Brady v. Maryland*, 373 U. S. 83, 83 S. Ct. 1194, it was stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

The petitioner in the instant case asked for the production of the books and records of Travis and his companies prior to the trial. This request was denied to him and as a result he was unable to produce evidence which may have

been beneficial to him and which may well have resulted in his acquittal. Evidence concerning the taking by Travis of $10,000.00 from one of the companies with which he was associated and converting it to his own use at the very time when he was supposed to have given the same sum of money to two of the petitioner's alleged co-conspirators was certainly material to the issue involved in this case. An examination of the books and records of Travis and his companies would have disclosed this information to the petitioner and made it available for him at his trial. The suppression of this important evidence by the prosecution violated due process.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DOMENICK VITULLO
A. CHARLES PERUTO
Counsel for Petitioner

202 North Broad Street
Philadelphia, Penna. 19102

APPENDIX "A"

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

Opinion by Montgomery, *J.* Filed: June 12, 1963

These appeals by John E. Francis, defendant, are from a judgment of sentence on one indictment charging "false pretenses" (1483) and the suspension of sentence on eleven others, viz.: 1477, 1478, 1479, charging bribery; 1484, 1485, charging false pretenses; 1487, 1488, 1489, charging extortion; and 1573, 1574, 1575, charging conspiracy; following his convictions thereof by a jury and the dismissal of his motions for a new trial and in the arrest of the judgments. He had been tried on twenty-six indictments consolidated for trial purposes, but was successful in obtaining a demurrer to one, not guilty verdicts on four, and the arrest of judgment on nine others. All of the indictments were based on appellant's activities in connection with contracts which the City of Philadelphia had with Hughes Steel Erection Company and A. Berlanger and Sons, Inc., for rehabilitation work[1] on the Frankford Elevated Railway in that city. During such activities appellant held the position of Deputy Commissioner in the Department of Public Property of that city and had the responsibility of overseeing the work being done under the contracts. Eli G. Travis, hereinafter mentioned, was Vice President of the Hughes Steel Erection Company and the owner of twenty per cent of its stock. John Hughes owned another twenty per cent and the Belanger brothers, who also owned A. Belanger and Sons, Inc., owned the remaining sixty per cent.

Appellant's present general contentions are, (1) that the evidence produced by the Commonwealth (appellant

[1] The main repairs were replacement of ballasts, and repairing expansion joints, trusses, cross beams, center girders, and hand rails.

offered no evidence) was insufficient to sustain the convictions; and (2) that he was denied a fair trial for various reasons.

The cases now under consideration may be grouped as follows:

1477 — Bribery and 1489 Extortion, resulting from a gift of clothing (value $305) from Travis to Francis.

1478 — Bribery and 1488 Extortion, resulting from gift of television set (value $533.99) from Travis to Francis.

1479 — Bribery and 1487 Extortion, resulting from the gift of an installment payment by Travis on a debt owed by Francis (amount $132).

1575 — Conspiracy and 1485 False Pretenses, resulting from a $32,475 payment by Philadelphia City to Hughes Steel Erection Company on December 31, 1959, for work not performed.

1574 — Conspiracy and 1484 False Pretenses, a similar payment of $18,635 made December 16, 1960, for work not performed.

1573 — Conspiracy and 1483 False Pretenses, a similar payment of $33,440.90 made March 9, 1960, for work not performed.

SUFFICIENCY OF EVIDENCE

Giving the Commonwealth the benefit of all the favorable testimony and all reasonable inferences arising therefrom, the relevant facts may be stated as follows: The City of Philadelphia and the Philadelphia Transit Company, having agreed to repair the Frankford Elevated section of the transit system, advertised for bids, and as a result thereof entered into four contracts (Nos. 725, 726, 727, and 728) with the low bidder, A. Berlanger and Sons, Inc. During

the progress of the work under these contracts, Travis, the representative of the contractor, established friendly relations with Benjamin Barone, secretary to William T. Gennetti, the Commissioner of the Philadelphia Department of Public Property, and with Harold Varani, the acting Chief Engineer of the City of Philadelphia, who was also attached to the Department of Public Property. In return for their good will and help in performing the contracts, Travis gave and promised to give them valuable emoluments; however, since appellant was their superior, it was suggested by them that Travis meet appellant. This was accomplished and appellant shared the hospitality afforded by Travis. When the bids were opened for the fifth contract (No. 729), neither company represented by Travis was the low bidder and the possibility of readvertising for new bids instead of awarding the contract to the low bidder was discussed by Travis with Barone and Varani, and later with appellant. This was subsequently accomplished, with the cooperation of appellant, by changing the requirements of the specifications of the contract so as to eliminate the cement work and substitute other work relating to the repair of expansion joints. With confidential information as to the estimate made by the City Engineer on the probable cost of the work covered by the revised specifications for contract 729, supplied by Barone, Varani, and at least with the knowledge and acquiescence of appellant, Hughes Steel Erection Company submitted the lowest bid and was awarded the contract. However, after performing part of the contract, Travis informed Barone, Varani and appellant that he was going to lose money and could not perform the work of "jacking the bents" (as required in the contract) for the cleaning and otherwise repairing of the expansion joints of the trackage. Item 47 of the contract covered 52 joints at $500 per joint or a total cost of $26,000 and item 48 covered 50 at $500 each or a total of $25,000. The Hughes Company did jack a few of the bents in cleaning the joints but failed to jack the others. This constituted inferior work with less effective results, nevertheless, the Hughes Company claimed

and was paid the full amount of the contract price with extras totaling $44,440.[2] With full knowledge that the work had not been done in accordance with the contract appellant permitted vouchers for the payments to be prepared by and cleared through his office on the certificate of his construction engineer and of Varani, then his Director of Architecture and Engineering. Appellant not only enjoyed the hospitality of Travis but received from him the items of value previously mentioned.

FALSE PRETENSES

In connection with these charges appellant argues that (1) his signature on the three vouchers on which the payments relating to items 47 and 48 of the contract were made has not been sufficiently proved; (2) the particular omissions in performance of the work have not been identified with the separate vouchers, and (3) there is no evidence that payment was made on the strength of the vouchers.

Appellant's signature does not appear on vouchers 8, 9, and 10, although he did sign the earlier vouchers 1, 2, 3, and 4 on contract 729. However, his certification is not the determining factor. Under the Act of June 24, 1939, P.L. 872, §836, as amended, 18 P.S. 4836, one who aids, assists or abets another in defrauding is guilty of the crime. Appellant, with knowledge that the contractor was not performing his contract but was nevertheless certifying that it had fully and properly performed it in order to secure full payment, was rendering aid and assistance to the defrauder by his acquiescence and failure to protect his employer's interest, even though he may not have performed the final act of certifying the vouchers.

Identifying each separate joint with one of the three vouchers would be impractical, if not impossible, and was

[2] The original bid was $299,842. The total payments were $344,282. Voucher 10 certified that items 47 and 48 had been one hundred per cent completed for which Hughes was paid $26,000 on item 47 and $25,000 on item 48.

unnecessary. The contract provided for the cleaning of 102 joints by jacking the bents. Travis testified they jacked only a few. There can be no other conclusion adopted but that some joints under both items 47 and 48 were not properly cleaned. This was sufficient since it establishes that in the case of each voucher which referred to either item 47 or 48 Hughes fraudulently received payment for work it had not done.

From the record as a whole it can be reasonably inferred that the payments authorized by the vouchers were received by Hughes.

CONSPIRACY

Since Hughes fraudulently secured money from the City of Philadelphia through the knowing cooperation of appellant and others, the verdicts of guilty are supported by the record. There was sufficient evidence on which the jury could and did find present the elements constituting conspiracy which were enumerated by Mr. Justice JONES in Commonwealth v. Neff, 407 Pa. 1, 7, 179 A.2d 630, 632, quoting Commonwealth v. Mittelman, 154 Pa. Superior Ct. 572, 36 A.2d 860, "... a concerted action pursuant to a common design to accomplish a common purpose." It must have seemed clear to the jury that Travis, Barone, Varani, appellant and possibly George Smith, Jr., were engaged in concerted action to help Hughes Steel Erection Company avoid a loss on contract 729, at the expense of appellant's employer, the City of Philadelphia. This possible loss was occasioned by its low bid which had been based on information, probably incorrect, obtained from the office of appellant. However, the evidence can support but one charge of conspiracy based on the agreement or understanding of Travis, Barone, Varani and appellant made at the time contract 729 was partially performed and at which time the pending loss was realized. The preparation of the vouchers and the clearing of them through appellant's office were merely overt acts, carrying out the purpose of the conspiracy. The preparation and clearing of the separate

vouchers did not constitute separate crimes of conspiracy and therefore, the three indictments for conspiracy were repetitious and the judgments on two of them should have been arrested. We shall sustain the appeal as to the two later ones (1573 and 1574) in point of time, but not as to the earliest (1575), which will be affirmed.

EXTORTION AND BRIBERY

Appellant was tried for statutory extortion and bribery. The record shows that the District Attorney made his election to proceed on statutory extortion rather than the common law crime and the charge of the court was on this basis.

Statutory extortion is defined as: "Whoever, being a public officer, wilfully and fraudulently receives or takes any reward or fee to execute and do his duty and office, except such as is or shall be allowed by some act of Assembly, or receives or takes, by color of his office, any fee or reward whatever, not, or more than is, allowed by law, is guilty of extortion, a misdemeanor. . . ." Act of June 24, 1939, P.L. 872, §318, 18 P.S. 4318. What appellant took was clearly not for doing his duty, but in violation of same. Therefore, the first provision would have no application, and if he received something not allowed or more than was allowed by law "by color of his office", he might be guilty. We have held many times that the extraction of money or other things of value under a threat of using the power of one's office may constitute extortion. Such provision of the statute is the same as it is under the common law crime. Commonwealth v. Burns, 197 Pa. Superior Ct. 282, 178 A.2d 619; Commonwealth v. Norris, 87 Pa. Superior Ct. 61; Commonwealth v. Wilson, 30 Pa. Superior Ct. 26; Commonwealth v. Brown, 23 Pa. Superior Ct. 470. However, in all of these cases, as well as many others examined by us, when there has been an extraction of money by "color of office" there has always been some threat, veiled or expressed, incident to it. We must therefore conclude

that under the statutory definition of extortion, when the offense is "by color of his office", some threat to perform the duty of or to exercise the rights or power of that office must be established.

Although we have recognized that the crimes of common law extortion and bribery may coincide at times, Commonwealth v. Wilson, supra, it is generally held that they are mutually exclusive crimes. 11 C.J.S., Bribery, §16, 5 P.L.E., Bribery, §1.

We find no evidence in the present record which, in any way, indicates that appellant secured the gifts given him by Travis through any coercion or threat, implied or expressed. Barone and Varani needed his cooperation to render the help they had promised to Travis, and even on the occasion when Travis sought a way to avoid performing part of the contract appellant was *approached*. He made no overtures to them. In connection with the first bids on contract 729, when he was approached about readvertising for new bids he was very reluctant to give out any hope that it could be accomplished. It was not until after he had told Travis it *would* be done that Travis said to him, "If you can get this thing through for me, I will pay you $3,000." This, we think, was a strictly voluntary gesture on the part of Travis. However, that promise does not concern us since appellant has been exonerated in that case.

We conclude that the evidence is *not* sufficient to sustain the convictions on the indictments charging extortion.

On the contrary, the evidence is overwhelming to sustain the convictions for bribery. Although there was some margin of dispute as to the criminal intent of appellant, an element of the case, the jury has resolved that issue against appellant.

Bribery is defined as ". . . or whoever being an agent, employe, or servant, solicits, accepts, or receives or takes, directly or indirectly, any commission, money, property, or other valuable thing as an inducement, bribe or reward for doing or omitting to do any act, or for showing any favor or disfavor in relation to the affairs or business of his princi-

pal, employer, or master, is guilty of a misdemeanor. . . ." Act of June 24, 1939, P.L. 872, §667, 18 P.S. 4667.

Appellant was an agent and employe of the City of Philadelphia, he took the gifts aforementioned, he did favors for Travis, and he omitted doing acts required of him in the protection and furtherance of his employer's interests. It was for the jury to determine whether the favors shown and the acts omitted were induced by these gifts. Although the purpose of such gifts is not generally expressed, since such matters are secretive, the circumstances under which they are given may be properly considered by the jury in resolving the issue. Commonwealth v. Friedman, 193 Pa. Superior Ct. 640, 165 A.2d 678. The established circumstances in this case were sufficient to sustain the verdicts of guilty on the bribery charges.

Trial Errors

Reference to an investigation of "alleged frauds" in the trade-in of city motor vehicles by Commonwealth witness Alan Hyman, Deputy Personnel Director, and Commissioner Gennetti was not prejudicial error. Mr. Hyman was called for the purpose of establishing the duties, salary, and work records of appellant, Varani and Barone. Counsel for appellant, on cross-examination, then undertook to establish his client's reputation for integrity and competency by questions and answers covering fifteen pages of the record. The District Attorney thereupon undertook to refute the impression this created by interrogating further as to the cause of appellant's separation from the city. In this further interrogation the matter of the investigation was mentioned and that appellant had been included in it. However, it was further shown that although there were several dismissals as a result of the investigation, Mr. Francis had not been dismissed. He resigned months later.

Appellant complains next that the Commonwealth did not produce or make available essential witnesses. Many of these were witnesses to transactions not presently under

consideration by us and their testimony was in relation to other charges from which appellant has already been exonerated. However, as to those who had any connection with the cases now before us, we find no error. A district attorney normally has the duty to produce eyewitnesses, but if he does not wish to use them he should make them available to the defense. Commonwealth v. Drew, 190 Pa. Superior Ct. 478, 154 A.2d 285. He need not call all witnesses named in an indictment or even all eyewitnesses if he believes, after examination or investigation, that their testimony is unreliable, or unworthy of belief, or surplusage or irrelevant. His only obligation under those circumstances is to notify defense counsel he does not intend to call all of the named witnesses. The calling of witnesses is within the discretion of the district attorney under the general supervision of the trial judge. Commonwealth v. Horn, 395 Pa. 585, 150 A.2d 872. The lower court did not consider, and we think properly, Walter Mathias, an employe or agent of Travis who may have made the car payment for Travis, or certan unidentified inspectors on the transit jobs, or the dummy stockholders of the Consolidated Industries, Inc. (another of Travis' enterprises), such persons as the District Attorney was compelled to call, or make available. Furthermore, they were all known to appellant. Varani and Barone were under indictment for their participation in the matter and were likewise known and available to appellant had he wished to call them.

Appellant's next assignment of error is that the court improperly and over objection admitted testimony of Commissioner Gennetti concerning an interrogation of the appellant by the City Controller, Alexander Hemphill, on or about April 15, 1961. The record shows that the District Attorney asked Commissioner Gennetti only whether he had been present in the office of the City Controller on April 15, 1961, when Mr. Francis was interrogated, and then asked the court to identify the sworn statement as "Exhibit 11g". This was allowed over appellant's objection. The District Attorney thereupon asked the witness to describe the

circumstances under which it had been taken. He asked nothing about the content of the document and proceeded to another phase of the case, after which he turned the witness over to appellant's counsel for cross-examination. On cross-examination appellant's counsel asked further about the circumstances surrounding the taking of the statement, and referred to the statement for the purpose of determining the circumstances that existed during the time it was taken. The following colloquy between the court and defense counsel demonstrates the situation very clearly:

(Page 246) "Mr. Peruto: At this point I should like to make it abundantly clear that I am cross-examining for the purpose of admissibility of the statement, and it is not to be construed in any fashion that I am having it testified to open the door, as it were, to having the statement read.

* * * * *

(Page 247) "The Court: . . . You know, gentlemen, the interesting part of this is that there was a statement mentioned and that is all. There was nothing more.

"Mr. Peruto: Over objection, I might say.

"The Court: That's right, over objection. Now, Mr. Peruto, under cross-examination you are making use of a statement about which we have heard nothing, and as Mr. Fitzpatrick says, you are opening the door. You may proceed and determine just how far you go with this, and the Court will determine how far Mr. Fitzpatrick may go."

Thereupon Mr. Peruto made particular references to the statement in asking questions as to whether appellant was accused of lying, given an opportunity to secure counsel or advised of his constitutional rights. Finally, the witness was asked by the court if the answers had been given voluntarily. His reply was (Page 254):

> ". . . I would say if he had been some one coming in off the street and not a city employee, I might conclude that there was no duress; but being a city employee made all the difference in the world. He had a job at stake, and I guess he had really but little choice to answer questions in fear of losing his job."

On redirect examination by the District Attorney the court ruled that (Page 259):

> ". . . I have permitted wide latitude to defendant's counsel on cross-examination. The door has been opened, and I am permitting on redirect examination the privilege of allowing the district attorney to proceed with his questioning on matters which were brought out on cross-examination. . . ."

Relying on this ruling, and ostensibly to overcome the implication that appellant had been compelled to give false answers to questions put to him, the witness was asked whether he had given any false answers. The witness said he could not answer such a question. Thereupon the District Attorney asked specific questions relating to appellant's position in the Department of Public Property, and as to his acceptance of gifts (all other questions related to duress), to establish that appellant had not been forced to give false answers. The witness testified that appellant had given the correct answers as to his position and had denied the acceptance of any gifts. There was nothing prejudicial to appellant in these questions and answers. In fact, they may have been beneficial to him.

In its charge, the jury was instructed concerning it, viz., "C-11g was a statement of the defendant which I had ruled out. You are not to consider that." We cannot say the lower court abused its discretion in acting as it did on such a controversial point of the case. In ruling out the statement it sustained appellant's position that it had been obtained under improper circumstances and was therefore not to be considered.

In view of the fact that appellant's counsel indicated no objection to the offer of Exhibits C-13, C-14, and C-15, which were the only ones relating to these cases before us (Page 590), we do not consider this assignment of error as meriting our discussion as it relates to them.

As to Exhibits C-11a, C-11b, C-11c, C-11d, and C-11f being correspondence between Varani and the independent engineers on these jobs, Yule, Sticklen, Jordan and McNee, between Varani and the Procurement Department of the city, and other interdepartmental memoranda, appellant's only objection to them was that they had not been properly identified. Our review of the record leads us to a contrary view.

The conspiracy charge previously discussed in this opinion was sufficient to make admissible the statements of the coconspirators, as given by Travis, which related to the cases now before us.

We find no prejudice to warrant a new trial on account of any alleged delay in bringing these cases to trial. The granting of a continuance is discretionary with the lower court and we find no abuse of that discretion present in this case.

The remaining arguments of the appellant deal with the same subject of prejudice arising from the acceptance of incompetent testimony, remarks of the District Attorney, of the court, of the Commonwealth, of the press, radio and television, and of the general public, creating, as expressed by appellant's counsel, "The Atmosphere and Tone of the Entire Proceedings". We have studied very carefully appellant's arguments, as well as the record, but fail to find any reason for the grant of a new trial.

In cases of public importance involving matters of public interest and public officials, the creation of "Atmosphere and Tone" to the proceedings cannot be avoided. However, unless the jury is prevented thereby from reaching a fair and impartial verdict, it does not compel the postponement of the trial or a retrial.

The jury was selected in this case after separate voir dire interrogations during which each juror was asked if he or she had read anything about the case in the newspapers.

In his learned and careful charge, Judge REIMEL admonished the jury to put aside all prejudice and sympathy, to decide the case on the evidence before it, and not upon any suspicion, particularly:

> "You may have heard or read something about other scandals in the city in other departments having occurred over the weekend. It has nothing to do with this case, and therefore you were not cautioned about not reading or talking about anything else other than this case, but perchance maybe you have or you have heard some one discuss it or you have read the newspapers. I must caution you that you in rendering your verdict in this case must confine yourselves without suspicion and without prejudice and without sympathy and without consideration of any other thing which has happened in any other place other than in the evidence before you. So, you must disregard any such thing, and if anything should happen to be in the back of your mind, dismiss it."

Further, the fact that appellant was exonerated on four of the charges indicates the fair-mindedness of the jury and that it was not swayed by prejudice against appellant.

Nor do we find any abuse of discretion by the lower court in refusing appellant's pretrial motions.

The record indicates the able handling by the lower court of a difficult situation, and we are of the opinion that appellant had a fair trial with full observation of his constitutional right to due process of law.

This appeal is sustained as to the three charges of extortion, being 1487, 1488, and 1489, July Sessions, 1961, and on the two charges of conspiracy at 1573 and 1574, July

Sessions, 1961 of the court below, on each of which sentence was suspended, and appellant is discharged on those charges; but the appeal is dismissed as to the charges of bribery at Nos. 1477, 1478, and 1479, July Sesions, 1961, on each of which sentence was suspended, and as to the charges of false pretenses at 1483, 1484, and 1485, July Sessions, 1961, on the first of which judgment of sentence was imposed (1483), and on the remaining two, suspended (1484 and 1485), and as to the charge of conspiracy at 1575, July Sessions, 1961, on which sentence was also suspended;

And appellant is ordered to appear in the court below at such time as he may there be called, and that he be by that court committed until he has complied with his sentence or any part of it which had not been performed at the time he was released on bail by the lower court.

MEMORANDUM OPINION OF THE TRIAL JUDGE

REIMEL, *J.*

This matter came before the Court on Defendant's Motion in Arrest of Judgment and Motion for New Trial as the Defendant was found guilty by the jury on seven bills charging bribery; seven charging extortion; three charging cheating by fraudulent pretenses; and four charging conspiracy.

The jury returned verdicts of not guilty on two indictments charging bribery and on two indictments charging extortion, and the Court sustained Defendant's Motion in Arrest of Judgment in regard to four bills charging bribery, four bills charging extortion, and one bill charging conspiracy.

The Defendant contends that the Act of March 31, 1860, P. L. 382, Section 49, 18 P.S. Section 2 requires that there be corroborating evidence. The Court need not decide whether this Act is applicable, for it is the opinion of the

Court that corrobarating evidence was presented. The circumstances of this case show a course of conduct on the part of the co-conspirators that could reasonably lead a jury to find the Defendant guilty. The Commonwealth's charges were supported by documentation, and the testimony of the contractor that he deliberately did not perform the contract is supported by the circumstances of this case.

The Defendant was Deputy Commissioner of Public Property of the City of Philadelphia, and he contends that he was not a public officer as defined by the Act of June 24, 1939, P. L. 872, Section 318; 18 P.S. Section 318, and, therefore, he could not be convicted under this section of the Penal Code. It is the opinion of the Court that the Defendant was a public officer. He performed some of the functions of government, and he was responsible for the fulfillment of grave and important duties: See *Richie v. Philadelphia*, 225 Pa. 511, 74 Atl. 430 (1909). His was not a mere ministerial position requiring the services of a clerk but a position of trust and responsibility.

The Defendant further contends that the evidence did not show that the Defendant accepted the gifts in exchange for any "favor" or "by color of his office," and, therefore, the Defendant cannot be convicted of bribery or extortion. The Defendant maintains that the Commonwealth only established that articles of value were taken or received. It is clear that the receipt of these gifts was connected with the fact that the Defendant occupied the office of Deputy Commissioner of Public Property. His acceptance of these gifts from a person upon whom he could confer favors by reason of his public office, regardless of whether or not he did confer such favors is sufficient to constitute the crimes of bribery and extortion.

This Court finds that the evidence was sufficient in regard to the six indictments relating to the payment vouchers. The Commonwealth established that these vouchers were paid, and that it was the responsibility of the Defendant to ensure that the work to be performed (the jacking of the bents) was actually performed.

As far as the Indictments for conspiracy are concerned, the Court finds that the evidence was sufficient to sustain a conviction. If the Defendant knew of the plan of non-performance of the contracts, and it was his responsibility to ensure performance, and he accepted gifts from one of the parties involved in the plan for non-performance, he can be considered a co-conspirator with the other planners.

In regard to Defendant's Motion for New Trial, it is the opinion of the Court that none of the reasons the Defendant presents for granting this Motion are sufficient. The verdict of the jury was supported by the evidence. The evidence showed, and the jury so found, that the Defendant accepted gifts during the time in which he held public office from parties upon whom he could confer favors, and that he violated the responsibility placed upon him by failing to ensure performance of contracts within his sphere of responsibility.

It is not reversible error for the Commonwealth to elicit testimony from two of its witnesses concerning the Defendant's reputation and his fulfillment of the duties imposed by his office as this area of inquiry was opened by the Defendant's counsel when he attempted to establish the Defendant's reputation, and these questions were concerned with his reputation.

The Defendant contends that the Commonwealth failed to produce and make available to him particular eye witnesses. However, the Defendant must be referring to corroborative witnesses rather than actual eye witnesses. Furthermore, the jury was instructed that it could infer from the non-production of any witness that his testimony would be adverse to the party who it believes should have called the witness.

There was no need for a continuance since the Defendant had more than ample time to prepare his defense.

Since the Commonwealth established that the Defendant accepted gifts from someone who could benefit, it was reasonable for the jury to conclude that his acceptance of these gifts made him a co-conspirator. Therefore, since the

conspiracy was proved, there was no error in the introduction of the statements of the co-conspirators.

There is no substance to Defendant's contention that his constitutional rights were violated when a pre-trial statement was introduced. Assuming that this statement was illegally obtained, once it was introduced by the Defendant in cross-examination, it became proper for the Commonwealth to rebut in re-direct examination implications about the statement brought out during cross-examination.

It is not hearsay evidence if an executive head of a department of city government testifies to facts which relate to the normal business of that department and which he discovered through normal departmental channels of information.

It was not reversible error to admit into evidence the models of portions of the Frankford Elevated System since the jury was instructed and cautioned in regard to these models and the Defendant was not prejudiced.

It was not reversible error to permit the Commonwealth's witness, Eli G. Travis, to read from his business records and to admit these records into evidence. These records are included within Section 2 of the Uniform Business Records Act, May 4, 1939, P. L. 42, No. 35, Section 2; 28 P.S. Section 91B. All the records which related to the business of the Department of Public Property were also admissible since they were properly qualified.

The reference by the Assistant District Attorney to the fact that defense counsel represented other alleged co-conspirators was not prejudicial to the Defendant as the Defendant made no objection when the statement was made. The Defendant was not prejudiced by the Assistant District Attorney's Opening Address to the jury, nor by the Assistant District Attorney's conduct during the trial. There was no error by the Trial Judge during the cross-examination of the Commonwealth's witness Eli G. Travis. It is not reversible error for the Trial Judge to refuse to permit the counsel for Defendant to question the Common-

wealth's witness, Fli G. Travis, during cross-examination about bias and prejudice on the part of the investigator, the investigator's opinion of Travis, the possible falsifications of Travis' business records, in regard to other matters and the manner in which Travis spent the money of his companies for entertainment. The refusal to permit these questions was within the discretion of the Trial Judge. The Defendant was not prejudiced by the comments of the Commonwealth's witness, Eli G. Travis, during cross-examination.

The Trial Judge properly refused to permit the counsel for the Defendant to read during his summation a manual which was not presented as evidence at the trial. There was no error in the denial of the Defendant's pre-trial motions.

The Defendant was not prejudiced by the publicity concerning this trial. The Trial was a fair trial.

The Defendant's Motions for New Trial and in Arrest of Judgment are denied.

APPENDIX "B"

JUDGMENT SOUGHT TO BE REVIEWED

The judgment of the Superior Court of Pennsylvania sought to be reviewed is as follows:

"This appeal is sustained as to the three charges of extortion, being 1487, 1488, and 1489, July Sessions, 1961, and on the two charges of conspiracy at 1573 and 1574, July Sessions, 1961 of the court below, on each of which sentence was suspended, and appellant is discharged on those charges; but the appeal is dismissed as to the charges of bribery at Nos. 1477, 1478, and 1479, July Sessions, 1961, on each of which sentence was suspended, and as to the charges of false pretenses at 1483, 1484, and 1485, July Sessions, 1961, on the first of which judgment of sentence was imposed (1483), and on the remaining two, suspended (1484 and 1485), and as to the charge of conspiracy at 1575, July Sessions, 1961, on which sentence was also suspended;

"And appellant is ordered to appear in the court below at such time as he may there be called, and that he be by that court committed until he has complied with his sentence or any part of it which had not been performed at the time he was released on bail by the lower court."

Office-Supreme Court, U.S.
FILED
DEC 19 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 629

JOHN E. FRANCIS, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN F. HASSETT
Assistant District Attorney
ARLEN SPECTER
Assistant District Attorney
Chief, Litigation Division
F. EMMETT FITZPATRICK, JR.
First Assistant District Attorney
JAMES C. CRUMLISH, JR.
District Attorney

Room 666, City Hall
Philadelphia 7, Pa.

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

There are no questions arising from the facts of the case which warrant review by the Supreme Court of the United States. A precise statement of the questions would make this clear but properly belongs in the Argument against the granting of the prayer of the petition.

STATEMENT OF THE CASE

The statement in the Petition and the State Courts' opinions appendixed sufficiently set out the facts. Petitioner, Deputy Commissioner of Public Property in Philadelphia, accepted gifts from a contractor who was doing business with the City for that Department, knowing that the contractor was cheating the City by taking unauthorized "short-cuts".

ARGUMENT

1. "... *the Supreme Court of the United States will overturn a felony conviction in a State Court if at the trial an involuntary confession is admitted into evidence because such a trial violates due process* (citations)." (Petition page 11.)

During the investigation petitioner was questioned by the City Controller; he asserted his innocence of wrong doing and denied receiving gifts from the contractor—there was no "confession".

The "involuntary" nature of the statement is described at page 26 of the Petition; as an employee he ran the risk of dismissal if he refused to answer questions pertaining to his employer's being cheated.

The statement was not "admitted into evidence". (See testimony quoted at page 25 of the Petition.)

2. "*One of the most fundamental principles in the administration of criminal justice is that a distinct crime cannot be given in evidence against a defendant who is being tried for another crime* (citation)." (Petition page 12.)

The Petitioner does not name the crime, for none was "given in evidence". Petitioner attempted—improperly—to convert a Commonwealth technical witness into a defense reputation witness. The nature of his testimony was such that no cross-examination was required. (No evidence was offered by the defense at trial.) Petitioner thereby introduced the subject of his work performance and his background in the Department. The witness had been questioned by investigators about the Petitioner's background during an investigation of "alleged frauds" on the City in a trade-in of City vehicles. The fact that the term "alleged frauds" was *used* did not impute misconduct to the appellant—this was quite clear at the trial. The term is waved out of context with the hope that it will produce an emotional judicial reaction.

3. *"The admission into evidence against the petitioner of records and letters without confronting the petitioner with the authors of these records and letters and without placing the author under oath and without affording the petitioner the opportunity to cross-examine them was in violation of the Due Process Clause of the Fourteenth Amendment."* (Petition pages 12, 13.)

Commonwealth Exhibits C-12, C-17, and C-18 were bills of Diner's Club Inc. and the Hotel Astor, New York City, which the contractor paid for the benefit of Petitioner. The papers had been made part of the business records of the contractor and were identified at trial by him in conformity with the Uniform Business Records Act (See opinion of the Trial Court at page 32 of the Petition). In any event, the question is moot, for, although the Jury found the Petitioner guilty of accepting these gifts, the Trial Court granted a Motion in Arrest of Judgment and discharged him because the benefits were conferred out of the jurisdiction of the Pennsylvania Court, i.e., the benefits were conferred and enjoyed in New York.

Commonwealth Exhibit C-11a is a letter addressed to the witness, attention Mr. Varani, from the "outside engineers", recommending that the original bid on Contract 729 be modified. On the letter is a note in the handwriting of the Petitioner (N. T. 103) agreeing "to throw out" the bid of another contractor and re-advertise the contract—thereby giving Travis a chance to bid on the contract.

Commonwealth Exhibit C-11d is a letter from the outside engineers to the Department of Public Property stating that the outside inspector was taken off the job due to "lack of funds" (N. T. 132). The Commissioner testified that he had seen the letter in the files of his Department although he did not know when (N. T. 131) and then went on to testify as to the lack of funds that required a request for additional appropriations of City Council (N. T. 133 to 137).

4. *It is argued that to set aside verdicts of guilty as to some indictments and to permit others to stand constitutes a denial of "equal protection of the law".* No authority is given for this proposition.

Petitioner was accused of accepting nine gifts; for each gift there was one indictment charging extortion and another indictment charging bribery. The jury found him not guilty of receiving two gifts (substantial cash payments); the trial Court granted Motions in Arrest of Judgment as to four gifts enjoyed out of the jurisdiction; the Superior Court held that there was not present in the case the coercion essential to extortion, and discharged him on the three remaining extortion indictments.

There had been four conspiracy bills, on appeal it was held that one was sufficient; Petitioner was discharged on three conspiracy indictments on the ground that they were duplicitous. A demurrer was sustained to a charge of making false documents. Judgments of conviction are undisturbed on three indictments charging obtaining property by false pretences, three charging bribery and one charging conspiracy.

There was no item of evidence admitted in support of the indictments as to which Petitioner was discharged which was not also admissible in support of the indictments of which he stands convicted (for example, evidence of entertainment in New York proved a relationship conducive to favoritism in awarding and supervising contracts).

5. "*The extensive and adverse publicity by the news media made a fair trial impossible and resulted in violation of the petitioner's rights under the Due Process Clause of the Fourteenth Amendment.*" (Petition page 14.)

Each time the question was raised during the trial the Court observed and evaluated the extent and nature of the "coverage" complained of and found nothing which could, deprive Petitioner of a fair trial. Neither in the petition nor at any stage below, is there one quotation from any newspaper or broadcast transcript to support the statement that he was prejudiced by news reports.

6. ". . . *the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution* (citation)." (Petition page 14.)

Petitioner, prior to trial, moved in open court for the right to inspect the books and records of the contractor and of all of the companies with which he was associated; the Court ruled that the wholesale impounding of these business records was unnecessary to the defense.

Petitioner had the right to subpoena whatever records he wanted; the Court demonstrated that he could take as much time as was necessary to examine whatever documents were produced at trial (for example, at page 150 of the notes of testimony petitioner declined the offer of the Court to take an extended recess to examine documents produced by the Commonwealth). Petitioner was not denied his right to have papers produced in response to subpoena nor of his right to make adequate inspection of any papers that were produced.

CONCLUSION

There is no reason why appellant should be granted a new trial. His guilt was established in a fair and impartial trial conducted in conformity with the requirements of due process of law. Wherefore, the Commonwealth respectfully requests this Honorable Court to deny the prayer of the Petition.

Respectfully submitted,

JOHN F. HASSETT
Assistant District Attorney
ARLEN SPECTER
Assistant District Attorney
Chief, Litigation Division
F. EMMETT FITZPATRICK, JR.
First Assistant District Attorney
JAMES C. CRUMLISH, JR.
District Attorney